

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATION AND ENERGY

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Investigation by the Department of Telecommunications	)	
and Energy on its own Motion into the Appropriate Pricing,	)	
based upon Total Element Long-Run Incremental Costs, for	)	D.T.E. 01-20
Unbundled Network Elements and Combinations of	)	
Unbundled Network Elements, and the Appropriate Avoided	)	
Cost Discount for Verizon New England, Inc.	)	
d/b/a Verizon Massachusetts' Resale Services in the	)	
Commonwealth of Massachusetts	)	

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**COMMENTS OF XO MASSACHUSETTS, INC.**

**ON VERIZON-MASSACHUSETTS MOTION TO REOPEN**

**I. INTRODUCTION**

XO Massachusetts, Inc. ("XO") opposes the Motion to Reopen filed by Verizon Massachusetts, Inc. ("Verizon") for several reasons as set forth in these comments.

First, there is no good cause for reopening the record because the financial implications on Verizon of TELRIC-based rates for the unbundled network elements in question, either was known, or should have been known very early in this proceeding and should have been raised at that point. Verizon knew that TELRIC rates would be much different from historically based rates and should not be heard to claim that is a new revelation. Second, XO disputes Verizon's claim that no prejudice would result. To our best knowledge, the newly set rates and the retroactive credit will not be implemented until the November 2003 invoice. To the

extent a re-opening is granted, it will only be a matter of time before Verizon argues that such implementation must be deferred pending any review on reopening. Where reopening is inappropriate, obvious harm would result for XO and other CLECs for whom UNE rates are a significant cost.<sup>1</sup> Substantively, there are several reasons that the Department cannot or should not grant the motion. First, the Department is bound to implement rates based upon the TELRIC approach. Although Verizon apparently does not dispute that fact directly, it does so in a backdoor manner. Specifically, Verizon's claim of confiscation is measured against historical costs, which is the basis upon which UNE rates are **not** to be set. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002). Further, in general, confiscation is determined by reference to all the revenues of a regulated entity – not just revenues resulting from a small subset of the revenue producing services offered.<sup>2</sup> As Massachusetts courts and the Supreme Court have consistently held,<sup>3</sup> the relevant inquiry is whether the Department's decision deprives a utility of the opportunity to earn a "fair and reasonable return" on its investment, measured by the overall impact of the order and whether it jeopardizes the financial integrity of a utility, either by leaving it insufficient operating capital or by impeding the ability to raise future capital.<sup>4</sup> To determine whether Verizon would hypothetically suffer confiscation, it would be necessary to review all Verizon's rates for all services and the costs for all the services as well. Not only would that inquiry be extremely burdensome (and unnecessary), it is an approach the Department has sought to move away from in granting

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<sup>1</sup> XO's primary interest concerns the UNE loop pricing.

<sup>2</sup> See, e.g., *Boston Edison Company v. Department of Public Utilities*, 375 Mass. 1 (1978); *Duquesne Light Company v. Barasch*, 488 U.S. 299 (1989); *Cambridge Electric Light Company*, D.P.U. 490 (1981).

<sup>3</sup> *Id.*; See also, *Massachusetts Electric Company v. Department of Public Utilities*, 376 Mass. 294, 299(1978)

<sup>4</sup> See, *Duquesne*, 488 U.S. at 310-12; *Automobile Insurers Bureau of Massachusetts v. Comm'r of Insurance*, 420 Mass. 599, 612-613 (1995)

some pricing flexibility to Verizon. *See Alternative Regulation*, D.T.E. 01-31. In fact, one might infer that Verizon is seeking a competitive advantage by refraining from raising rates for other services that it could raise, while at the same time claiming Department ordered rates on UNEs are confiscatory. In this way, Verizon's Motion improperly seeks "single issue" rate relief.<sup>5</sup>

## **II. VERIZON HAS FAILED ITS HEAVY BURDEN OF SHOWING GOOD CAUSE**

The Department's procedural rules (220 CMR 1.11(8)) only allow reopening upon a motion of a party and "showing of good cause". The Department has observed that such efforts to introduce new evidence in a reopened proceeding "labor under a heavy burden of untimeliness...". *Bay State Gas Company*, D.T.E. 01-81, p. 21. XO contends that Verizon has not met any reasonable burden, much less a heavy burden. The extensive proceeding and record, which Verizon would now have the Department ignore and supercede, makes clear that the relative levels of TELRIC-based UNE loop rates were known to be far below what Verizon now asserts is necessary to avoid confiscation. Although the rates Verizon had argued for during the case are not insignificantly greater than the rates required by the Department's order, Verizon's own proposed rates were significantly less than what Verizon now claims are needed to avoid confiscation. In that context, the time for raising confiscation claims is long past. Verizon makes no real effort to address why the confiscation claim is only raised now. Therefore, Verizon's motion must be denied. To the extent that some new reason is set forth

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<sup>5</sup> See, e.g., *Cambridge Electric Light Co.*, D.P.U. 490 (1981); *New England Telephone and Telegraph Company*, D.P.U. 84-267 (1985).

in Verizon's Reply Comments, interested parties must be allowed to address such new arguments then.

### **III. VERIZON'S CLAIM OF NO HARM RINGS HOLLOW**

Competitive carriers are subject to well-known financing pressures which have been exacerbated by the delay in applying the rates that the Department has recently found appropriate. Although Verizon does not in its Motion suggest that the long-awaited reduction in the relevant UNE pricing should be further delayed, should the Department give any credence to Verizon's arguments for reopening, it should not allow any further delay in implementation of the UNE pricing that was determined only after extraordinary due process and efforts of the Department and the parties.

### **IV. VERIZON'S MOTION IS REALLY A BACKDOOR ATTACK ON THE TELRIC METHODOLOGY**

By definition TELRIC is a forward looking approach to pricing. In contrast, the cost studies offered now by Verizon in support of its claims of confiscation are on their face based upon historical costs. See Attachment B, "Results Summary" referring to "Estimated Historical Cost". That cost is the basis of Verizon's claim of earnings shortfalls. However, the Department lacks the authority to set UNE prices on historical costs, so Verizon is asking the Department to do something it cannot do under Federal law. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002). In this way, it appears that Verizon is challenging the entire TELRIC pricing approach, but not in so many words. This is simply not the proper forum for such arguments.

Additionally, it is clear that any claim of confiscation must consider the financial circumstances of the complaining entity on a broad basis. Thus, it is not sufficient to say that rates for one or two services are set so low that the entity cannot earn a reasonable return. Rather, it is necessary to examine whether the complaining entity's rates as a whole are inadequate. Where Verizon has control over at least some of those rates as a result of a grant of pricing flexibility, it conceivably could raise such rates and ameliorate its revenue shortfall. Also, where the entire circumstances of Verizon's finances should be considered in determining whether Verizon was truly suffering confiscation, it is necessary to review all other revenue sources and appropriate levels of costs before concluding that Verizon is indeed suffering confiscation. Verizon's use of historical costs for the UNEs in question and its application of such costs to hypothetical future projections of wholesale activity only serves to exaggerate the claimed impacts and is really beside the point given that a full range of other expense items and service revenues ought to be considered.

### **CONCLUSION**

In sum, Verizon has failed to sustain its burden of showing that there is good cause now to consider its skewed look at the potential financial impacts of implementation of the UNE loop and UNE-P prices, as ordered by the Department after a very extensive and thorough review. Further, the Department cannot grant Verizon's motion because to do so would be to undo the mandate of the United States Supreme Court and the Federal Communications Commission to develop UNE pricing on a forward looking basis.

Respectfully submitted  
XO Massachusetts, Inc.

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